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**Local 917, International Brotherhood of Teamsters¹
and Peerless Importers, Inc. Case 29–CE–128**

September 30, 2005

DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On March 30, 2005, Administrative Law Judge Raymond P. Green issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

I. INTRODUCTION

This case arises from allegations that the Respondent, Local 917 International Brotherhood of Teamsters, violated Section 8(e) of the Act. Before the hearing, the Respondent served a subpoena on the Charging Party, Peerless Importers, Inc. (Peerless), seeking certain information to support its defenses. When Peerless refused to furnish certain information, the judge sua sponte dismissed the General Counsel's complaint as a sanction against Peerless. For the reasons set forth below, we find that the judge abused his discretion by imposing this harsh sanction under the circumstances of this case.

II. BACKGROUND²

Peerless is an employer engaged in the distribution of alcoholic beverages throughout the New York City Metropolitan area. The Respondent represents a unit of Peerless' drivers and helpers. The parties' collective-bargaining agreement generally requires Peerless to use

unit employees to handle shipments to and from its facilities.³

Peerless purchases alcoholic beverages from a supplier, Diageo North America Inc. (Diageo). Before October 1, 2002, Peerless was one of two distributors of Diageo's beverages. After submitting the successful bid in a competition, Peerless became Diageo's exclusive distributor. On October 1, 2002, Peerless and Diageo entered into a distribution agreement governing their exclusive-dealing relationship.

Beginning in the spring of 2003, Diageo started using its own employees to transport beverages to Peerless; unit employees no longer handled these shipments. Consequently, the Respondent filed a grievance in November 2003 alleging that Peerless breached the collective-bargaining agreement by failing to use unit employees to transport Diageo's beverages from Diageo's facility to Peerless' warehouse. The Respondent demanded arbitration over that grievance. In the arbitration, Peerless defended on the ground that the Respondent was violating Section 8(e) by attempting to apply the collective-bargaining agreement to work that Peerless no longer controlled. On September 28, 2004, an arbitrator issued an award finding that Peerless breached the collective-bargaining agreement by "permitting merchandise from Diageo North America to be delivered to the Company's [Peerless'] warehouse by non-bargaining unit personnel." Although the arbitrator found that Peerless breached the collective-bargaining agreement, he expressly refused to pass on Peerless' 8(e) defense. The arbitrator explained in his decision that the Board should decide the 8(e) issue. Consequently, the arbitrator postponed issuing a

¹ We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

² The judge did not make any findings of fact in his decision, having dismissed the General Counsel's complaint without taking any evidence. For purposes of reviewing the judge's dismissal, we shall accept the complaint's factual allegations as true and construe the complaint in the light most favorable to the General Counsel. Cf. *Detroit Newspapers*, 330 NLRB 524, 525 fn. 7 (2000) (denying respondent's motion to dismiss after accepting complaint's factual allegations as true and construing complaint in light most favorable to the General Counsel). On remand, the judge is free to make factual findings based on the evidence.

³ Sec. 3.27 of the collective-bargaining agreement provides that "[t]he handling of all railroad shipments . . . must be done by employees covered by this agreement." Sec. 3.28 provides that "[t]he unloading, loading and transportation of merchandise at freight depots, domestic and foreign, has been and continues to be unit work within the scope of this Agreement." Sec. 3.29 provides that "[m]erchandise shipped from anywhere within the Continental United States or its possessions, including Puerto Rico, whether by steamship, steamship container, or steamship van, piggyback, fishy-back, birdy-back, railroad car or van, shall come to rest somewhere within the areas mentioned above there to be handled and transported to the wholesaler by employees covered by this Agreement." Sec. 3.30 provides that "[t]he Employer shall transport all such merchandise arriving in above named conveyances with its own equipment and with a chauffeur and helper from the seniority list assigned to each truck." Finally, Sec. 3.31 provides that "[m]erchandise in foreign commerce . . . shipped here, whether loaded in vans, containers, tanks or other conveyances and all consignments of wines and liquors . . . shall be unloaded and/or transported wholly in the state of its arrival, by chauffeurs and helpers covered by this Agreement."

remedy and directed Peerless to file an unfair labor practice charge with the Board.⁴

Peerless filed a charge with the Board on October 6, 2004. On December 30, 2004, the General Counsel issued a complaint alleging that the Respondent violated Section 8(e) by grieving Peerless' failure to use unit employees to perform covered work.

Before the unfair labor practice hearing, the Respondent served a subpoena on Peerless seeking: (1) all documents and any materials that relate to Peerless' use of nonunit personnel to move freight including, but not limited to, any contracts or agreements with Diageo; and (2) all documents relating to meetings or discussions with Diageo concerning the movement of freight. Peerless filed a petition to revoke the subpoena on March 1, 2005. On March 7, 2005, the judge issued an order reversing ruling on Peerless' petition.

At the hearing, Peerless offered to provide the Respondent with a redacted version of its Distribution Agreement with Diageo. Peerless also furnished an unredacted copy to the judge to review in camera. On the record, the judge reviewed the redacted and unredacted versions side by side, while Respondent's counsel followed along with a redacted copy.⁵

Peerless then asked the judge to issue a protective order in the event that he would require it to furnish an unredacted version of the distribution agreement to the Respondent. The judge refused, explaining "I don't do confidentiality orders You want to try the case, turn over the document; you don't want to try the case, goodbye."

Peerless refused to furnish an unredacted copy in the absence of a protective order. Consequently, the judge stated on the record that he intended to dismiss the complaint *sua sponte* as a sanction for the noncompliance, and he closed the hearing without taking any evidence. No party had urged the judge to dismiss the complaint. The judge invited the parties to file posthearing briefs and indicated that a written opinion would soon follow.

The judge later issued his written decision dismissing the complaint *sua sponte*. He found that the redacted information "could possibly be relevant" to the Respondent's defense and that Peerless lacked a confidentiality interest sufficient to warrant nondisclosure. He noted that he had denied Peerless' request for a protective order because, in his opinion, he lacked the power to hold counsel in contempt for violating such an order.

III. DISCUSSION

As discussed below, we find that the judge abused his discretion by imposing the harsh sanction of dismissal against the General Counsel for Peerless' refusal to fully comply with the subpoena. In finding that the judge abused his discretion, we rely heavily on the existence of less severe sanctions, which the judge could have imposed on Peerless..

The exercise of the authority to sanction parties who fail to comply with a Board subpoena "is a matter committed in the first instance to the judge's discretion." *McAllister Towing & Transportation Co.*, 341 NLRB No. 48, slip op. at 3 (2004).⁶ Accordingly, we review the judge's imposition of sanctions under the "abuse of discretion" standard.⁷

As explained above, the Respondent served its subpoena on Peerless before the hearing in this matter. When Peerless refused to furnish an unredacted copy of the subpoenaed document, absent a protective order, the judge dismissed the complaint. There were, however, a number of other less drastic sanctions available to the judge. See *McAllister Towing*, *supra*; NLRB Division of Judges Bench Book Sec. 8-620. For example, the judge could have permitted the Respondent to use secondary evidence to prove that Peerless purposefully relinquished its right to control the work at issue in order to avoid its collective-bargaining obligations. Additionally, the judge could have precluded Peerless from rebutting that secondary evidence or cross-examining witnesses about it. Also, the judge could have drawn adverse inferences against Peerless. Although the judge had available a

⁴ The arbitrator's award stated, "If the Company does not file an unfair labor practice charge with the NLRB within 60 days of the date of this Award, or if the NLRB does not issue a complaint after such a charge is filed, the Arbitrator will hold a hearing at the request of either party to determine the appropriate remedy."

⁵ The record before us does not contain either the redacted or the unredacted versions of the distribution agreement. However, the transcript of the hearing contains the judge's description of the redacted paragraphs during his side-by-side comparison. According to this description, the redacted version offered by Peerless eliminated some paragraphs and blackened out some of the numbers and percentages set forth in various sections of the agreement. For example, it redacted the contract's cancellation fee, a performance bonus calculation, and a business development fund calculation.

⁶ Although Member Schaumber dissented in *McAllister Towing*, *supra*, he does not disagree with the proposition for which it is cited here.

⁷ We are reviewing only the sanction imposed by the judge on Peerless for refusing to comply with the subpoena. We are not reviewing the judge's ruling denying Peerless's request for a protective order. Peerless did not request special permission from the Board for an interlocutory appeal of the judge's ruling denying its request for a protective order. See Sec. 102.26 of the Board's Rules and Regulations. Nor did Peerless file an exception to that ruling. Despite the judge's stated aversion to issuing a protective order, it is clear that judges do have that authority. *AT&T Corp.*, 337 NLRB 689, 693 fn. 1 (2002); *National Football League*, 309 NLRB 78, 88 (1992); *United Parcel Service*, 304 NLRB 693 (1991); *Carthage Heating Co.*, 273 NLRB 120, 123 (1984). NLRB Division of Judges Bench Book § 8-330.

wide range of seemingly appropriate sanctions, he took the unusual, and perhaps unprecedented, step of dismissing the complaint. See *Smitty's Supermarkets*, 310 NLRB 1377, 1380 (1993) (“[T]he Board apparently has never imposed the sanction of dismissal because of subpoena noncompliance.”); see also *General Drivers Local 554*, 253 NLRB 1, 2 (1980); *Selwyn Shoe Mfg. Corp.*, 172 NLRB 674, 675 (1968), *enfd.* in relevant part 428 F.2d 217 (8th Cir. 1970).

Given the availability of less severe sanctions, which the judge apparently did not consider, we find that the judge abused his discretion by dismissing the complaint.⁸

ORDER

IT IS ORDERED that the December 30, 2004 complaint is reinstated.

IT IS FURTHER ORDERED that this proceeding be remanded to Administrative Law Judge Raymond P. Green for further action consistent with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules shall be applicable.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

⁸ Because neither the unredacted nor the redacted versions of the distribution agreement are in the record before us, we do not reach the issue of whether the redacted information is confidential or lacks any relevance to contested issues. These are issues to be addressed by the judge on remand. Consequently, we deny Peerless' exception to the judge's ruling denying its petition to revoke the subpoena.

Member Schaumber agrees with his colleagues that the judge had a number of options available to him short of dismissal of the complaint. In addition, in his view, the judge's handling of the Charging Party's request for a protective order, particularly his response that “[he] does not do confidentiality orders,” does not appear to be the kind of discerned consideration of an issue raised by a party appearing before the Board which one is to expect. If the judge was hesitant for some reason to rule on the matter, he could have called a recess to give the parties an opportunity to resolve the Charging Party's confidentiality concern informally. Absent giving the parties such an informal opportunity, Member Schaumber believes the judge should have considered the merits of the request and granted or denied it.

Rachel Zweighaft Esq., for the General Counsel.

Gene M. J. Szufliata, Esq., counsel for the Union.

Allen B. Roberts, Esq. and *Donald B. Krueger, Esq.*, counsel for the Charging Party.

DECISION

RAYMOND P. GREEN, Administrative Law Judge. I opened and closed this hearing on March 8, 2005 without taking testimony. In essence, I decided to dismiss this case when the Charging Party's counsel refused to turn over an unredacted copy of a document subpoenaed by Local 917, International Brotherhood of Teamsters after I had denied a petition to revoke. I am going to dismiss the complaint because I believe that the document in question could possibly be relevant to the only defense that the Respondent could make in this case and therefore, its nondisclosure would be prejudicial to the Respondent's right to a fair trial.

The charge was filed by Peerless Importers Inc. on October 6, 2004 and the complaint was issued on December 30, 2004. In substance the complaints alleged:

1. That Peerless, located at 16 Bridgewater Street, Brooklyn, New York is engaged in the distribution of alcoholic beverages.

2. That Diageo North America Inc., located at 450 Park Ave. South, New York, New York, is engaged in the wholesale distribution of alcoholic beverages.

3. That on or about May 17, 2004, Peerless and the Union entered into an agreement retroactive to November 11, 2002 that states:

3.27. Scope of Agreement. The handling of all railroad shipments, whether it be piggy back, tractor-trailer, flexivan, or any other type of railroad conveyance, and those of freight consolidators and car loading companies, and freight brought via water or water borne, fish-back or birdy-back, originating elsewhere and terminating anywhere within Kings County, New York County, Bronx, Queens, Nassau and Suffolk Counties, bounded roughly by a line starting on the North Shore of Port Jefferson and running southward through Coram in the middle and on down to Patchogue on the South Shore, and in Staten Island and within a radius of fifty miles into the State of New Jersey, must be done by employees covered by this Agreement.

3.28. The unloading, loading and transportation of merchandise at freight depots, domestic and foreign, has been and continues to be unit work within the scope of this Agreement. All freight consigned to wine and whisky wholesalers, distributors, distillers, rectifiers or other processors or receivers of same, under contract to the Union, shall be handled and hauled from anywhere within the areas mentioned above to the Employer's receiving and shipping premises in accordance with the following stipulations and conditions, provided, however, if the Employer, at its option, assigns at least two employees as regular platform workers, the employer shall not be required to employee drivers and helpers for each outside vehicle.

3.29. Merchandise shipped from anywhere within the Continental United States or its Possessions, including

Puerto Rico, whether by steamship, steamship container, or steamship van, piggyback, fishy-back, birdy-back, railroad car or van, shall come to rest somewhere with the areas mentioned above, there to be handled and transported to the wholesaler by employees covered by this Agreement.

3.30. The Employer shall transport all such merchandise arriving in above named conveyances with its own equipment and with a chauffeur and helper from the seniority list assigned to each truck. The chauffeur must remain with the load he or she has picked up until it is fully unloaded.

3.31 Merchandise in foreign commerce from other countries or commonwealths, arriving at ports in the United States or arriving at foreign ports and subsequently shipped here, whether loaded in vans, containers, tanks or other conveyances and all consignments of wines and liquors, or part thereof, when arriving or conveyed in barrels, casks, hoghead, pipes, tanks, or other type bulk liquor carrier, whether originating domestically or imported, shall be unloaded and/or transported wholly in the state of its arrival, by chauffeurs and helpers covered under the Agreement. Pier and piggyback may exceed six hundred cases.

4. That starting in or about April 2003, Diageo began making deliveries of alcoholic beverages directly to the Employer's Brooklyn facility.¹

5. That in or about November 2003, the Respondent attempted to apply the provisions of the agreement to the deliveries made by Diageo by filing a grievance alleging that Peerless was violating the agreement by allowing Diageo to make deliveries of alcoholic beverages directly to the Brooklyn facility.

6. That on or about June 28, 2003, the Union took the aforesaid grievance to arbitration thereby entering into and reaffirming the agreement described above. This agreement, as applied, is alleged to violate Section 8(e) of the Act.

The complaint alleges, the answer admits and I find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Answer also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I received into evidence as General Counsel Exhibit 2, an Opinion and Award issued on September 28, 2004 by arbitrator Richard Adelman. That Award was issued after he held a hearing on June 28, 2004. In that forum, in which both parties were represented by counsel and had the opportunity to present evidence, Peerless contended that the decision to have the deliveries made by Diageo's drivers was not within Peerless' control and/or that the provisions that the Union were seeking to enforce were violative of Section 8(e) of the National Labor Relations Act. As to the 8(e) argument, the arbitrator noted that the Company had not filed an 8(e) charge with the NLRB and that although he would have no hesitancy in ruling on that question if the Board had deferred its own proceedings to arbitration, that was not the case here. He also stated:

¹ At the opening of the hearing, the General Counsel amended this allegation to change the date from October 2003 to April 2003.

Moreover, assuming that the Company's reading of the law regarding the meaning of the "right of control" test is correct, the Company, by not submitting its agreement with Diageo into evidence, failed to establish that Diageo had control over the work at issue. In addition, as stated above, the Company was aware of the terms of the agreement with the Union at the time it contracted with Diageo, yet the Company did not notify the Union of the arrangement it was making with Diageo. In short, although the Arbitrator finds that the Company violated the Agreement, it is not clear whether or not the Company had the requisite control over the work, or whether or not other factors should be considered in determining if Section 8(e) has been violated, decisions that should be made by the NLRB.²

The General Counsel asserted in her opening statement that she was not claiming that the clauses referred to above, taken separately or together, violated Section 8(e) of the Act on their face. That is, she concedes that the clauses could be interpreted, in the appropriate circumstances, as having a valid work preservation object. Her contention is that in the present circumstances, the Union asked the arbitrator to enforce the clause in an unlawful way because the work claimed (certain truck driving) was work "not within the control" of Peerless and therefore was not work that could be "preserved."

The legal principles in these types of cases are as follows. In cases involving Section 8(e), the General Counsel alleges that a contract between a union and a company employing individuals represented by the Union has entered into an agreement whereby the Company has agreed not to do business with any other person with whom the Union has a primary dispute. In those circumstances, if such an agreement, either on its face or in its specific application, is used to prevent an employer or person with whom the Union has no primary dispute to cease doing business with another employer with whom the union does have a primary dispute, then the agreement is deemed to have a secondary objective and constitutes a violation of Section 8(e) of the Act. In such circumstances, the Employer having the collective bargaining agreement with the Union is described as being an "unoffending neutral."

Inasmuch as the agreement was made more than 6 months prior to the filing of the charge, the General Counsel must show that it was reaffirmed within the 10(b) statute of limitations period. Board cases have held that this test can be met by showing that the union has filed a grievance and taken a case to arbitration to enforce the contractual provisions, not for a work preservation objective, but to compel the contracting employer to cease doing business with another employer or person. *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, (1988).³

² One wonders what impact, if any, the Board's Spielberg doctrine would have on this type of case if the arbitrator applied the applicable law and made fact findings that were not clearly erroneous.

³ I should note here that the Board in this case also held that an 8(e) finding based on the filing for arbitration would not be inconsistent with the holding of *Bill Johnson's Restaurant*. The Board stated:

Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme

Faced with this type of charge, a union typically argues that the attacked clause does not have a secondary objective and that it merely is designed to preserve the work of the bargaining unit employees covered by the collective bargaining agreement within which the alleged offending clauses reside. In this case, the Union contends that it has a contract with Peerless that covers the wages, hours and working conditions of truck drivers who are employed by Peerless. It contends, and that facts no doubt would confirm, that for years, Peerless truck drivers have uniformly had the assignment of picking up beverages from Diageo's facility and delivering them to its own warehouse. Therefore, the Union asserts that (a) this type of delivery work is clearly bargaining unit work; (b) that the Union is merely seeking to preserve that work for the employees it represents; and (c) that it therefore has a "primary" dispute with Peerless and not with Diageo. In seeking to enforce its contract with Peerless, the Union contends that it merely is trying to enforce the bargain it made with Peerless to preserve bargaining unit work.

The General Counsel responds to this argument by contending that although the clauses in question may very well have a preservation of work objective, its enforcement in this case would have a secondary objective because in this case Diageo made the decision to have the deliveries reassigned from Peerless' drivers to its own drivers. She therefore argues that when this happened in April 2003, Peerless no longer had the "right to control" regarding the assignment of this work. Arguing that Peerless, having lost the right of control, the General Counsel contends that enforcement of the clauses in question cannot have a primary work preservation objective because Peerless no longer had the work to be preserved. That is, even if Peerless wanted to, it could not assign the work to its own drivers. The leading case dealing with the distinction between lawful work preservation clauses versus unlawful secondary hot cargo clauses is *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967).

Of course every thrust has its riposte and the Union argues that if it turns out that Peerless had a role with Diageo in making the decision to have the work reassigned from its own drivers to the drivers of Diageo, (perhaps in order to reduce its own costs), then Peerless would not be an innocent party to this transaction and therefore the General Counsel would not have the right to argue that Peerless did not have the "right of control."⁴ The Union was not privy to the negotiations between

Diageo and Peerless that led up to either the original Distribution Agreement or to a change in what appears to have been a long standing practice in the way that deliveries were made from one to the other. (According to the arbitrator, the Union was not even given advance notice of the change.) And since the Union does not have access, in a Board proceeding, to any form of pretrial discovery, it subpoenaed certain information from Peerless, (returnable on the date of the hearing), no doubt hoping that such documents, in conjunction with skillful cross examination and a little bit of luck, would show that Peerless was not an "unoffending neutral." Quite frankly, under the existing view of the law, this would be the Union's only available legal defense. See for example, *Painters District Council No. 20 (Uni-Coat Spray Painting Inc.)*, 185 NLRB 930 (1970).

Prior to the opening of the hearing, the Union's counsel subpoenaed documents from the Charging Party. Schedule A of the subpoena lists the documents as:

1. All documents and any materials that relate to Peerless' use of non-unit personnel to move freight including, but no limited to, any contracts or agreements with Diageo North America, Inc.
2. All documents relating to meetings or discussions with Diageo North America Inc. concerning the movement of freight.

On March 1, 2005, Peerless filed a petition to revoke the subpoena, albeit it did offer to produce "a copy of relevant portions of the Distribution Agreement, [between Diageo and Peerless], redacted to preserve non-relevant confidential information, at such time and such form as directed" Peerless further stated that it would provide a document which included a PowerPoint presentation entitled "Peerless Delivered Pricing Operational Preview."

On March 7, 2005, I issued an Order indicating that I would reserve ruling on the petition until after the opening statements in the case. I also stated:

In this regard, the parties should be advised that once this case becomes a matter of public record by way of a trial, any contention that any documents or information is or should be considered confidential is viewed with great skepticism by me. Therefore, Peerless should bring to the hearing the entire contents of the documents subpoenaed and be prepared to present them to me in camera without any redactions.

Soon after the opening of the hearing, the subpoena issue was revisited. And after a couple of hours of discussion, Peerless' counsel obtained, via fax, an unredacted version of the 2002 distribution agreement between it and Diageo. The unredacted version was shown to me along with the redacted version. A redacted version was shown to the Respondent's counsel. From statements by Peerless' counsel and based on a review, it appears that this document is a contract between Diageo and Peerless whereby Peerless became, after winning a bid between itself and another local distributor, the exclusive distributor or alcoholic beverages imported or handled by Diageo

having its own drivers do the work and thereby mitigate Peerless' cost structure by eliminating that expense from Peerless.

Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight)*, 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

⁴ It is hypothetical but entirely possible that in seeking to obtain the contract from Diageo, Peerless overbid on its pricing and found itself burdened by an inflated cost structure. In that case, it is again hypothetical but possible that the solution could have been for the parties to have agreed that Diageo would undertake the costs of deliveries, by

for a region encompassing New York City and environs. It is a 30-plus page document requiring certain sizeable payments by Peerless to Diageo and requiring certain payments in the event that either wants to terminate the agreement. The redacted version eliminated some paragraphs and blackened out some of the numbers and percentages set forth in various sections of the agreement. There was nothing in the unredacted version of the document that struck me as being sufficiently confidential so as to warrant nondisclosure. Indeed, the General Counsel did not argue that there was any confidential information in the unredacted version of the agreement. (The document does not contain trade secrets such as formulas, patents etc. and does not, as far as I can see, disclose the types of commercial information, such as customer lists, that might normally be described as confidential.) Moreover, there did not seem to be anything in the document that talked about whose drivers would make the deliveries from Diageo to Peerless.

Concluding that the Union was entitled to review any and all documents relating to the relationship between Diageo and Peerless concerning the sale and/or delivery of alcoholic beverages from 2002, I directed Counsel for Peerless to turn over the unredacted version of the agreement. I did so not because I thought that this document would necessarily be decisive in proving either side's case, but because I felt that it was arguably relevant to the Union's defense and that it might lead to other information that could be useful. *Brinks Inc.*, 281 NLRB 468 (1986); *Perdue Farms, Inc.*, 323 NLRB 345, 348 (1997) enfd., *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998) (information need only be "reasonably relevant." I do not know enough about this industry to determine if the re-

dacted information could be relevant to the issues in this case, but since I don't believe that they are sufficiently confidential, I can see no reason to permit their nondisclosure.

Notwithstanding my Order, Peerless decided to not turn over the unredacted version of the document to the Union and took back all of the distributed redacted versions. Although I suggested that Counsel for Peerless might want to make the redacted version an exhibit in the case in order to preserve the record, Counsel chose not to do so. Despite my previous warnings, I thereupon closed the hearing and stated that I would dismiss the complaint because the Charging Party's attorneys decided to not turn over information that could possibly be used by the Union in support of its defense.⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁶

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 30, 2005

⁵ Earlier, the Charging Party's counsel asked for a protective order in relation to the documents. I decided that such an order would not be appropriate inasmuch as I do not have the power to hold the other counsels in contempt in the event that there is noncompliance. In short, I see no point in issuing orders that cannot be enforced.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.